BAN CHUAN TRADING CO SDN BHD & ORS

v.

NG BAK GUAN

COURT OF APPEAL, KUALA LUMPUR
NH CHAN JCA
AHMAD FAIRUZ JCA
MOKHTAR SIDIN JCA
[CIVIL APPEAL NO: P-02-563-95]
9 OCTOBER 2003

CIVIL PROCEDURE: *Appeal - Assessment of damages - General and special damages - Whether income based on assessments of Inland Revenue Department proper - Whether 20% addition to income for expected profits justified - Whether sufficient factors taken into consideration for special damages - Whether respondent failed to make an election*

The respondent filed a summons-in-chambers to repudiate a tenancy agreement executed with the appellants on the ground that the appellants failed to deliver vacant possession. The learned judge allowed the application and ordered the assessment of damages by the senior assistant registrar ('SAR').

Before the SAR, the respondent submitted that he intended to use the premise in question under the tenancy agreement ('the said premise') for his business of selling clothes. He gave evidence that he was carrying on the same business at a shop on another street not far from the said premise. He added that it was his intention to move his business from that shop to the said premise where he expected his profits to increase by 20%. The respondent also tendered the Inland Revenue Department's assessments of his income for the years 1991, 1992 and 1993 ('the assessments'). The SAR awarded RM97,200 as general damages for loss of profit based on the income stated in the assessments and added a further 20% to that income.

In respect of special damages, the respondent gave evidence that he had ordered some furniture and mannequins in preparation to move into the said premise. He produced the relevant invoices and sales order. The SAR awarded RM17,200 as special damages.

The appellants dissatisfied with the awards appealed to the judge who affirmed the award on general damages but dismissed the award on special damages. The appellants were dissatisfied with that decision and appealed to this court.

The issues were: (1) whether the assessments should have been admitted in evidence and the 20% addition on income was proper; (2) whether special damages was justified; and (3) whether the respondent failed to make an election.

Held:

Per Mokhtar Sidin JCA (Judgment of the Court)

[1] The SAR should not have admitted the assessments in evidence to support the respondent's claim for loss of profits. They were in respect of the respondent's personal income and not his income from his business of selling clothes. Further, the assessments were not income for the years stated therein. The SAR erred in taking the income stated in the year of assessment 1991 as the income of the respondent for the year 1991. This was also true for those assessments for the years 1992 and 1993. The income shown in those assessments were for the actual income of the respondent for the previous years. Therefore, the basis of the SAR's award was totally wrong. (pp 794 h & 795 a-f)

[2] There was no evidence to support the respondent's claim that his business would increase by 20% if he moved to the said premise. Mere assertion is not evidence. There was also no evidence to show that the respondent would carry on the business of selling clothes in the said premise except his declaration of his intention to do so. The appellants should not be penalised for the business to be carried out by the respondent at the said premise which the appellants had no knowledge. Further, the respondent had continued his business of selling clothes at the other outlet. As such, the expected loss of profit could not be the whole of the income shown in those assessments plus 20% but should only be 20% of the income shown therein. (pp 795 g-h & 799 c-d)

[3] The respondent knew soon after signing the agreement that the said premise was not available due to the fact that the existing tenant of the said premise refused to move out and hand over vacant possession. His business of selling clothes was not affected because he continued to carry on that business at the other outlet. The respondent could have minimised his losses if he had taken steps to terminate the agreement as soon as it was made known to him that the said premise was not available. He waited in order to justify his claim for loss of profits for three years. He was not entitled to do that. It followed that the award of RM97,200 as general damages should be set aside. (p 799 f-g & 800 a)

[4] The learned judge erred in disallowing the award on special damages. The SAR had given it sufficient consideration before he awarded RM17,200 as special damages. (p 800 g)

[5] Even though the respondent did not make any election, it was of no consequence to this appeal. The respondent failed to prove his claim for general damages arising from the breach. The respondent was only entitled to the claim for special damages. Thus no election was necessary in the present appeal. (pp 801 h & 802 a-b)

[General damages of RM97,200 set aside; special damages of RM17,200 reinstated, each party to bear own costs; deposit to be refunded to appellants.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Responden telah memfail satu saman dalam kamar bagi menamatkan satu perjanjian tenansi yang dimeterainya dengan perayu atas alasan bahawa perayu gagal menyerahkan milikan kosong. Yang arif hakim telah membenarkan permohonan dan memerintahkan supaya gantirugi dinilai oleh Penolong Kanan Pendaftar ('PKP').

Di hadapan PKP, responden menyatakan bahawa beliau berhasrat untuk menggunakan bangunan di bawah perjanjian tenansi berkenaan ('bangunan tersebut') untuk perniagaan menjual pakaian. Beliau memberi keterangan bahawa beliau kini menjalankan perniagaan yang sama di sebuah kedai yang terletak di sebatang jalan tidak jauh dari bangunan tersebut. Beliau menambah bahawa adalah menjadi hasratnya untuk berpindah ke bangunan tersebut di mana beliau menjangka keuntungan akan bertambah sebanyak 20%. Responden telah juga mengemukakan keterangan cukai pendapatannya seperti yang dinilai oleh Jabatan Hasil Dalam Negeri bagi tahun-tahun 1991, 1992 dan 1993 ('penilaian'). PKP membenarkan award sebanyak RM97,200 sebagai gantirugi am kerana kehilangan keuntungan berdasarkan pendapatan yang tertera dalam penilaian dan menambah 20% lagi kepada pendapatan tersebut.

Berkaitan gantirugi khas, responden memberi keterangan bahawa beliau telah menempah perabot dan patung-patung peraga sebagai persiapan untuk berpindah ke bangunan tersebut. Turut dikemukakan adalah inbois-inbois dan pesanan-pesanan jualan yang relevan. Berikutnya PKP membenarkan award RM17,200 sebagai gantirugi khas.

Perayu-perayu yang tidak berpuas hati merayu kepada hakim yang mengesahkan award gantirugi am tetapi menolak award gantirugi khas. Masih berasa tidak puas hati, perayu-perayu membuat rayuan lanjut ke mahkamah ini. Isu-isu yang berbangkit adalah: (i) sama ada penilaian boleh diterima masuk sebagai keterangan, sekaligus sama ada tambahan 20% kepada pendapatan wajar; (2) sama ada gantirugi khas wajar dan patut; dan (iii) sama ada responden gagal membuat pilihan.

Diputuskan:
Oleh Mokhtar Sidin HMR (Penghakiman Mahkamah)

[1] PKP tidak seharusnya menerima masuk penilaian sebagai keterangan bagi menyokong tuntutan kehilangan keuntungan responden. Ianya adalah berkaitan pendapatan peribadi responden dan bukannya pendapatan dari perniagaan menjual pakaian. Lagipun, penilaian bukanlah pendapatan bagi tahun-tahun yang tercatat di situ. PKP silap apabila mengambil pendapatan yang dicatat bagi tahun 1991 sebagai pendapatan responden pada tahun 1991. Keadaan adalah sama bagi penilaian tahun-tahun 1992 dan 1993. Pendapatan yang ditunjukkan bagi tahun-tahun tersebut adalah bagi pendapatan sebenar responden bagi tahun-tahun sebelumnya. Oleh itu, asas award PKP pada keseluruhannya adalah salah.

[2] Tiada keterangan yang menyokong tuntutan responden bahawa perniagaannya akan bertambah 20% jika beliau berpindah ke bangunan tersebut. Pengataan semata-mata bukanlah keterangan. Juga tiada keterangan, selain dari kata-kata responden sendiri, yang menunjukkan bahawa beliau akan menjalankan perniagaan menjual pakaian di bangunan tersebut. Perayu tidak patut dihukum kerana perniagaan yang akan dijalankan oleh responden di bangunan tersebut yang perayu langsung tidak ketahui. Lagipun, responden masih lagi menjalankan perniagaan menjual pakaian di tempat yang satu lagi. Oleh yang demikian, kehilangan keuntungan yang dijangka bukanlah keseluruhan pendapatan yang ditunjuk di dalam penilaian dicampur 20% lagi, tetapi hanyalah 20% daripada pendapatan yang ditunjuk di dalam penilaian tersebut.

[3] Responden mengetahui sejurus selepas menandatangani perjanjian bahawa bangunan tersebut tidak akan diperolehi oleh kerana penyewa semasa bangunan tersebut enggan keluar dan mengembalikan milikan kosong. Perniagaannya menjual pakaian tidak terjejas oleh kerana responden masih meneruskan perniagaan tersebut di kedai yang satu lagi. Responden boleh mengurangkan kerugiannya jika dia mengambil langkah segera menamatkan perjanjian sebaik sahaja diberitahu bahawa bangunan tersebut tidak dapat

diperolehi. Responden sebaliknya menunggu sehingga tiga tahun bagi menjustifikasikan tuntutan untuk kehilangan keuntungannya. Ia tidak berhak untuk berbuat demikian. Ianya mengikut bahawa award RM 97,200 sebagai gantirugi am harus diketepikan.

[4] Yang arif hakim silap apabila menolak award gantirugi khas. Pertimbangan yang secukupnya telah dibuat oleh PKP sebelum memberikan award RM17,200 sebagai gantirugi khas.

[5] Walaupun responden tidak membuat sebarang pilihan, ianya tidak mempunyai apa-apa kesan terhadap rayuan ini. Responden gagal membuktikan tuntutan untuk gantirugi amnya yang berbangkit dari kemungkiran berkenaan. Responden hanya berhak kepada tuntutan gantirugi khas. Dengan itu pilihan adalah tidak perlu dalam rayuan di sini.

[Gantirugi am berjumlah RM97,200 diketepikan; gantirugi khas berjumlah RM17,200 dipulihkan; masing-masing pihak menanggung kos sendiri; deposit dikembalikan kepada perayu-perayu.]

Case(s) referred to:
Ismail v. Hj Taib [1972] 1 MLJ 259 ***(refd)***
Popular Industries Ltd v. Eastern Garment Manufacturing Sdn Bhd [1990] 1 CLJ 133; [1990] 2 CLJ (Rep) 635 HC ***(refd)***
Tan Geok Khoon & Gerald Francis Robless v. Paya Terubong Estate Sdn Bhd [1988] 2 MLJ 672 ***(refd)***
Toeh Kee Keong v. Tambun Mining Co Ltd [1968] 1 MLJ 39 ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 74
Income Tax Act 1967, s. 20

For the appellants - Walter BC Teoh; M/s Saw & Teoh
For the respondent - Cheah Choo Kheng; M/s Karpal Singh & Co

[Appeal from High Court, Pulau Pinang; Civil Suit No: 22-173-93]

Reported by Usha Thiagarajah

JUDGMENT

Mokhtar Sidin JCA:

The respondent entered into a written tenancy agreement with the appellants but failed to hand over vacant possession of the property to the respondent after executing the tenancy agreement. The tenancy agreement executed was for a period of three years, ie, from 1 October 1991 to 31 October 1994 in respect of premise No. 209 Jalan Pasar, Bukit Mertajam, Province Wellesley (hereinafter referred to as "the said premise"). On 25 June 1993, the respondent filed an application by way of summons-in-chambers seeking to repudiate the tenancy agreement. The prayers prayed for as stated in the summons-in-chambers were:

(a) bahawa perjanjian sewa bertarikh 1hb Oktober, 1991 di antara Plaintiff dan Defendan-defendan dibatalkan (rescinded);

(b) wang cengkeram sebanyak RM17,500.00 dikembalikan oleh Defendan-defendan kepada Plaintif;

(c) Defendan-defendan membayar kepada Plaintif gantirugi dan kerugian dengan faedah yang ditaksirkan oleh Penolong Kanan Pendaftar;

(d) kos.

On 15 September 1993, the learned judge allowed the application and ordered the assessments be made before the senior assistant registrar (SAR). The present appeal is only in respect of the assessments by the SAR.

On 15 October 1994, the SAR made the following awards:

(a) RM97,200 as general damages for loss of profit; and

(b) RM 17,200 as special damages for the purchase of furniture and mannequins.

The appellants being dissatisfied with the awards made by the SAR appealed to the judge. The judge dismissed the appeal against the award for general damages but allowed the award on special damages. Being dissatisfied with that decision, the appellants appealed to this court. We have given our decision earlier whereby we allowed the appeal by the appellants in respect of general damages and reinstated the award on special damages in the sum of RM17,200. In other words, the award of RM97,200 as general damages by the SAR was set aside while the award of RM17,200 as special damages by the SAR was reinstated and affirmed.

Now we give our reasons for doing so.

Before us, the learned counsel for the appellants submitted that the tenancy agreement (hereinafter referred to as "the agreement") was a non-performance agreement. From the very beginning, immediately after the execution of the agreement, it was made known to the parties that the appellants were unable to deliver vacant possession of the premise stated in the agreement. The reason being the previous tenant refused to deliver vacant possession to the appellants and continued to occupy the said premise. Despite the fact that it was being made known to the respondent, the respondent insisted and demanded vacant possession of the premise by a letter from his solicitors dated 8 November 1991. It was not disputed that when the appellants failed to deliver vacant possession the respondent did not take any action to repudiate the agreement. Despite being informed by the appellants that they had difficulties in delivering vacant possession, the respondent attempted to pay the monthly rents which the appellants refused to accept. The situation remained the same until October 1992 (about a year later) when the respondent sprang into action and issued a notice to terminate the agreement. The notice to terminate was followed by the filing of the writ and the statement of claim. The appellants admitted liability when the respondent filed a summons-in-chambers stated earlier resulting with an order dated 15 September 1993 ordering that the assessment of damages to be done before the SAR.

At the hearing of the assessment of damages, the respondent claimed:

(a) loss of profits from 1.11.1991 to 31.10.1994 (the life span of the agreement) as general damages; and

(b) money expended for the purchase of furniture and mannequins in preparation of carrying on business at the said premise as special damages.

The claim by the respondent was in accordance with s. 74 of the Contracts Act 1950. The operation of this was explained by Ong Hock Thye FJ (as he was then) in *Toeh Kee Keong v. Tambun Mining Co Ltd* [1968] 1 MLJ 39, where at p. 40 he stated:

> Section 74(1) of the Contracts (Malay States) Ordinance, 1950, is the statutory enunciation of the rule in *Hadley v. Baxendale*. This section reads:
>
> > When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

The rule lays down the main principles as follows:

> Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered as either arising naturally, ie, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.

In more compendious terms the rule has been restated by Asquith LJ in *Victoria Laundry (Windsor) Ltd v. Newman Industries Ltd* in a passage which I shall quote in full:

> (1) It is well settled that the governing purpose of damages is to put the party whose rights have been violated in the same position, so far as money can do so, as if his rights had been observed: *(Sally Wertheim v. Chicoutimi Pulp Co)*. This purpose, if relentlessly pursued, would provide him with a complete indemnity for all loss *de facto* resulting from a particular breach, however improbable, however unpredictable. This, in contract at least, is recognized as too harsh a rule. Hence,
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> (2) In cases of breach of contract the aggrieved party is only entitled to recover such part of the loss actually resulting as was at the time of the contract reasonably foreseeable as liable to result from the breach.
>
> (3) What was at that time reasonably so foreseeable depends on the knowledge then possessed by the parties or, at all events, by the party who later commits the breach.
>
> (4) For this purpose, knowledge 'possessed' is of two kinds; one imputed, the other actual. Everyone, as a reasonable person, is taken to know the 'ordinary course of things' and consequently what loss is liable to result from a breach of contract in that ordinary course. This is the subject matter of the 'first rule' in *Hadley v. Baxendale, supra*. But to this knowledge, which a contract-breaker is assumed to possess whether he actually possesses it or not, there may have to be added in a particular case knowledge which he actually possesses, of special circumstances outside the 'ordinary courses of things', of such a kind that a breach in those special circumstances would be liable to cause more loss. Such a case attracts the operation of the 'second rule' so as to make additional loss also recoverable.
>
> (5) In order to make the contract-breaker liable under either rule it is not necessary that he should actually have asked himself what loss is liable to result from a breach. As has often been pointed out, parties at the time of contracting contemplate not the breach of the contract, but its performance. It suffices that, if he had considered the question, he would as a reasonable

man have concluded that the loss in question was liable to result (see certain observations of Lord du Parcq in the recent case of *Monarch Steamship Co Ltd v. Karlshamns Oljefadbriker (A/B).*

(6) Nor, finally, to make a particular loss recoverable, need it be proved that upon a given state of knowledge that defendant could, as a reasonable man, foresee that a breach must necessarily result in that loss. It is enough if he could foresee it was likely so to result. It is indeed enough, to borrow from the language of Lord du Parcq in the same case, at page 158, if the loss (or some factor without which it would not have occurred) is a 'serious possibility' or a 'real danger'. For short, we have used the word 'liable' to result. Possibly the colloquialism 'on the cards' indicates the shade of meaning with some approach to accuracy.

As to what sort of damages the respondent is entitled to, we would like to quote the words of Lord Denning MR in *Anglia Television v. Reed* which was cited by Suffian FJ (as he was then) in *Ismail v. Haji Taib* [1972] 1 MLJ 259 at p. 260. Lord Denning M.R. said:

... It seems to me that a plaintiff in such a case as this had an election; he can either claim for his loss of profits; or for his wasted expenditure. But he must elect between them. He cannot claim both. If he has not suffered any loss of profits – or if he cannot prove what his profits would have been he can claim in the alternative the expenditure which has been thrown away, that is, wasted by reason of the breach. That is shown by *Cullinane v. Britist 'Rema' Manufacturing Co Ltd* [1953] 2 All ER 1261, 1264, 1265; [1954] 1 QB 292, at 303, 308.

The burden of proving the damages is always on the parties claiming the damages. In *Tan Geok Khoon & Gerard Francis Robless v. Paya Terubong Estate Sdn Bhd* [1988] 2 MLJ 672 at p. 680 Edgar Joseph Jr. J (as he was then) said:

This brings to my mind the famous words of Lord Goddard in *Bonham-Carter v. Hyde Park Hotel*:

> Plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars and, so to speak, throw them at the head of the court, saying: 'This is what I have lost, I ask you to give me these damages'. They have to prove it.

Thus, in *Ashcroft v. Curtin*, a plaintiff claiming for diminution in the profits of his one man business could not succeed in this claim though the evidence pointed to a decrease in profitability which was due to the injury, the records kept being too rudimentary and the accounts too unreliable to quantify the loss.

In *Popular Industries Limited v. Eastern Garment Manufacturing Sdn Bhd* [1990] 1 CLJ 133; ([1990] 2 CLJ (Rep) 635) at pp. 140-141 (p. 644) Edgar Joseph Jr. J said:

> I now turn to consider the crucial question; have the plaintiffs proved their claim for damages as alleged or at all? With regard to this part of the case, I would preface what I have to say by referring to certain well-established principles.
>
> It is axiomatic that a plaintiff seeking substantial damages has the burden of proving both the fact and the amount of damages before he can recover. If he proves neither, the action will fail or he may be awarded only nominal damages upon proof of the contravention of a right. Thus nominal damages may be awarded in all cases of breach of contract (see *Marzetti v. William*). And, where damage is shown but its amount is not proved sufficiently or at all, the court will usually decree nominal damages. See, for example *Dixon v. Deveridge* and *Twyman v. Knowles*.

That is the burden of proof imposed on the respondent in order to succeed in his claim for damages. Let us now turn to the evidence as found by the SAR.

Loss Of Profits (General Damages)

Under this claim, the SAR awarded the sum of RM97,200 and the learned judge affirmed the award. In his evidence before the SAR, the respondent stated that he intended to use the said premise for his business of selling clothes. He gave evidence that before and at the time of signing the agreement he was carrying on the same business at a shop on another street not far from the said premise. He added that it was his intention to move his business from that shop to the said premise where he expected his business profits to increase by 20% because of the location of the said premise. He claimed that the location of the said premise was more favourable than the shop that he was occupying. Though the appellants did not deny this, no other evidence was adduced to prove this. To support his claim for loss of profits, the respondent tendered the assessments by the Inland Revenue Department in respect of his income for the years of assessment 1991, 1992 and 1993. The SAR admitted those assessments as evidence despite the objection by the appellants. The SAR then awarded the sum of RM97,200 as loss of profits based on the income stated in those assessments and topped them up with 20%.

We are of the view that the SAR had erred in making the award based on those assessments alone. First of all, we are of the opinion that those assessments should not have been admitted at all. Looking at those assessments, it is clear to us that the assessments were in respect of the personal income and not his income from his business of selling clothes. There is nothing to

relate the income stated therein with the income of his business of selling clothes except for the respondent's words. The appellants' counsel was correct in pointing out to the court that the income as stated in the assessments was his income from all sources such as dividends, interests, rentals, etc. and not from the business of selling clothes alone. It is for the respondent to prove that the income stated in those assessments was the income from his business of selling clothes. This could be done by producing the return forms submitted to the Inland Revenue Department upon which those assessments were raised. The return forms would show the source of income. Alternatively, as suggested by the appellants' counsel, he could produce the accounts books of his business of selling clothes. The respondent failed to do this and as such had not discharged the burden on him.

Another reason why we are of the view that those assessments should not have been admitted is that the income shown in those assessments were not income for the years stated in those assessments. Section 20 of the Income Tax Act 1967 (before it was amended by the Income Tax (Amendment) Act 1999) provides:

> 20. Basis years
>
> For the purposes of this Act, the calendar year immediately preceding a year of assessment shall constitute the basis year for that year of assessment.

In other words, the assessment for the year of assessment 1991 refers to the actual income of the respondent for the year 1990. As such, the SAR was wrong to take the income stated in the year of assessment 1991 as the income of the respondent for the year 1991, and this is also true for those assessments for the years 1992 and 1993. The income shown in those assessments were for the actual income of the respondent for the previous years. The SAR had erred in taking the income shown in those assessments as the income of the respondent for those years. The basis of the SAR's award was totally wrong. As such, the award by the SAR could not be sustained.

We are also of the view that the SAR had erred when he added 20% to the income stated in those assessments. First of all, there was no evidence to support the claim that the respondent's business would increase by 20% if he moved to the said premise. The only evidence was the location of the said premise was more favourable. There was no evidence to show it was so. Mere assertion is not evidence, what more when the figure arrived at was 20%. It is for the respondent to prove that the business of his would increase by 20% if he moved to the said premise.

We would refer to *Popular Industries Limited v. Eastern Garment Manufacturing Sdn Bhd (supra)* where the claim and the evidence produced were somewhat similar to the present appeal. Edgar Joseph Jr. J at p. 141 (p. 644) said:

> On the question of the quality of evidence expected of a plaintiff, it is well to remember what Devlin J said in *Biggin v. Permanite* at p. 438, namely, 'where precise evidence is obtainable the court naturally expects to have it, where it is not, the court must do the best it can'. Nevertheless, it remains true to say that generally 'difficulty of proof does not dispense with the necessity of proof (see *Aerial Advertising Co v. Batchelors Peas* at p. 796 per Atkinson J). A case which affords an illustration of the requirement of reasonable certainty in this area is *Ashcroft v. Curtin* in which the plaintiff claiming for diminution of profits of his one-man-business failed in his claim; even though the evidence pointed to a decrease in the company's profitability due to the injury, the records produced being too rudimentary and the accounts too unreliable to quantify the loss. So also when, as here, the claim is for the difference between the contract price and a clear and undoubted market price, absolute certainty in proving damages is possible and therefore the court will expect precise evidence to be given. (See para 345 *McGregor on Damages* (15th Ed)).
>
> It is with the above principles in mind that I turn to examine the evidence adduced by the plaintiffs to determine if they have proved the fact of damage and its amount.
>
> The main witness called by the plaintiffs on this important issue of the quantum of damages was Mr Patrick So, a chartered accountant and partner of the firm of Richter, Usher & Vingberg, internationally known as Clark Kenneth Laventhal, the auditors and accountants of the plaintiffs.

Further down at pp. 142-143 (pp. 646-647) his Lordship said:

> I must now proceed to evaluate the testimony of this witness. It is an elementary rule, often overlooked with resulting confusion and possible injustice that cases are decided on evidence; that means, of course, evidence that is admissible in law and relevant to the issues arising for decision.
>
> Now, it was alleged by the plaintiffs that both the oral testimony of the accountant Mr So (regarding their financial operations) and the statement P76 prepared by him, were based upon the results of his examination of the accounts books of the plaintiffs for the relevant period. However, the accounts books themselves were never produced and the defendants never dispensed with formal proof of the loss of profits alleged or at all. In my opinion, the result of this glaring omission, was to render such oral evidence of Mr So and P76 inadmissible in evidence and it makes not the slightest difference that Mr and

Mrs Segal confirmed the accuracy of P76. I take the law on this point to be correctly stated by the Vice-Chancellor in *Johnson v. Kershaw*. In that case, the evidence of an accountant was tendered containing the results of his examination of certain partnership books, but the accounts books themselves upon which he based his statement were not in evidence. The Vice-Chancellor said:

> If the account books had been in evidence, the accountant's statement of the results of his examination of those books, as the evidence of a person of skill, might be receivable; but, inasmuch as the books were not in evidence, I must decline to receive the deposition of Mr Peet as to their contents.

That case commended itself to Dixon J (as he then was) in *Potts v. Miller* at p. 303.

Nor, does it make any difference that counsel for the defendants never called for production of the accounts books, since the defendants never agreed to dispense with formal and proper proof of the loss of profits (see *Guan Soon Tin Mining Co v. Ampang Estate Ltd* at p. 30).

Indeed, a consideration of the relevant provisions of our Evidence Act 1950 (Rev 1974) leads irresistibly to the same conclusion, as I shall now attempt to demonstrate. It is a firmly established rule (to which there are exceptions) requiring that when documentary evidence is tendered, primary evidence of the document, that is to say the production of the document itself is essential (see s. 64 of the Evidence Act).

The exceptions to the rule are also well-established and specifically provided for (see s. 65(1) of the Evidence Act). Equally clearly, the burden of proving the existence of any circumstances bringing the case within any of these exceptions lies upon the party seeking to adduce secondary evidence of the contents of the document. (See s. 104 illus (b) of the Evidence Act).

In the present case, the plaintiffs made not the slightest attempt to discharge that burden, with the result that P76 which was alleged to be extracted from the books of accounts of the plaintiffs, which were never produced, was inadmissible in evidence. Similarly, the oral evidence of the accountant Mr So, which was based on P76, was also inadmissible for the same reason.

It is true that counsel for the defendants did not object to the admissibility of P76 or the oral evidence thereon of the accountant Mr So. But, to quote Masodkar J in *Sanjay Cotton Co v. Omprakash* at p. 43:

> .... Here what one finds is that the learned counsel merely said that he has no objection to exhibit the documents .... If that be so, it is neither an admission as to the documents nor can be treated as an admission of the contents thereof.

Moreover, it is settled law that inadmissible evidence does not become admissible simply be reason of failure to object. If any authority is needed for this proposition I would refer to the following passage in *Sarkar, Laws of Evidence* (13th Ed) at p. 51 applied by Lee Hun Hoe CJ (Borneo) in *Malaysia National Insurance Sdn Bhd v. Malaysia Rubber Development Corporation* at p. 127:

> An erroneous omission to object to evidence not admissible or relevant under the Act does not make it admissible. It is the duty of the court to exclude all irrelevant or inadmissible evidence even if no objection is taken to its admissibility by the parties ...

Without the evidence of the accountant Mr So as to the financial operations of the plaintiffs and without P76, there was still the general and slender testimony of Mr and Mrs Segal, but this testimony suffers from the same defects as to non-production of the accounts books hereinbefore mentioned and therefore does not, in my opinion, prove the damages claimed sufficiently or at all.

> I would go further and say that even had the accounts books been in evidence they could not by themselves have been sufficient to charge the defendants with liability having regard to the provisions of s. 34 of the Evidence Act so that the entries themselves would have had to be proved by someone having personal knowledge of the transactions reflected in such entries. The accountant and auditor Mr So, despite what he might say, was not such a person as he, like any accountant, would of necessity have to rely upon information derived from documentary sources and explanations provided by his clients when preparing the accounts. To emphasize the point I would add that it is common knowledge that when accountants prepare accounts for their clients for submission to the Inland Revenue Department they so certify in the accounts.

Similarly, in the present appeal the production of the assessments alone should not be allowed. Other evidence must be adduced to show that income stated in those assessments were income from his business of selling clothes. What is more important, there was nothing to show that his business would increase by 20% if the respondent moved to the said premise. We are of the view that the respondent failed to prove his loss of profit.

We have taken note the agreement was a non-performance agreement. It was not disputed that the respondent never moved into the said premise, what more to carry on his business therefrom. The agreement was never exhibited. As such, we take it that the agreement was the normal tenancy agreement whereby the appellants let the shophouse to the respondent and what sort of business to be carried out would not be stated in that agreement. As such, there was no evidence to show that the respondent would carry on the business of selling clothes there except his declaration of his intention to do so. As such, the basis of his claim of loss of business of selling clothes could not be upheld. In our view, the appellants should not be penalised for the business to be carried out by the respondent at the said premise, which the appellants had no knowledge.

In awarding the sum of RM97,200 as general damages, the SAR stated this to be the loss of profits suffered by the respondent. In coming to this conclusion, the SAR took the income as stated in those assessments and added up another 20% and he arrived at the figure of RM97,200 as loss of profits. Evidence shows that the respondent continued his business of selling clothes at the old shop. When the respondent stated that the assessments were his income from his business of selling clothes, he did not stop his business of selling clothes. As such, the expected loss of profit could not be the whole of the income shown in those assessments plus 20%, but should be 20% of the income shown in those assessments. Again, we find that the SAR had committed another error.

Another significant point to be considered here is the fact that the respondent knew soon after signing the agreement that the said premise was not available due to the fact that the existing tenant of the said premise refused to move out and hand over vacant possession. Instead of terminating the agreement, he said he was willing to wait and he forwarded his monthly rentals to the appellants which the appellants refused to accept. In our view, that was a clear indication that the premise was not available. Instead of terminating the agreement immediately, he waited for a year and then claimed for loss of profits for three years. The respondent knew that his business of selling clothes was not affected because he continued to carry on that business in the other outlet. In our view, the respondent could have minimised his losses if he had taken steps to terminate the agreement as soon as it was made known to him that the premise was not available. He waited in order to justify his claims of loss of profits for three years. We are of the view that he is not entitled to do that.

For the above reasons, we are of the view that the respondent is not entitled to the claim for loss of profits. Even assuming that he is entitled to loss of profits, we find that there was no evidence to support his claim for loss of profits.

The award of RM97,200 as general damages which the SAR found as loss of profits should be set aside.

Wasted Expenditure Because Of The Breach (Special Damages)

The SAR awarded the respondent the sum of RM17,200 as special damages. In assessing the damages, the SAR took into consideration the preparation by the respondent to move into the said premise. The respondent in his evidence stated that in preparation to move into the said premise he ordered some furniture and mannequins. For those he produced the invoices and the sales order. The invoices and sales order clearly show the amount exceeded the sum of RM17,200.

In his decision, the SAR stated that in respect of special damages he would only award damages in respect of the purchase of furniture which was supported by the invoice dated 18 October 1991. The amount stated therein. He did not allow damages in respect of the purchase of mannequins because it could be used by the respondent in the other outlet from which he was carrying on his business at that time. He did not allow the damages in respect of purchase of a cash register because the respondent admitted using that in the other outlet. The SAR awarded the sum of RM17,200 as special damages to the respondent.

On appeal, the learned judge allowed the appeal by the appellants. The special damages were then deleted from the award given to the respondent. Reading the judgment of the learned judge we fail to find the reason for him disallowing the special damages. It is obvious that he did not dismiss that award because of election. For the above reasons, we find that the learned judge had erred in disallowing the award on special damages. We have examined the record in respect of the award by the SAR for wasted expenditure and we found that the SAR did not commit any error in awarding RM17,200 as special damages.

For the above reasons, we reinstated the award of RM17,200 as special damages to which the respondent is entitled to. The order of the learned judge in disallowing the special damages of RM17,200 is hereby set aside and the award by the SAR in respect of special damages is reinstated.

Election

The last issue raised by the appellants was the issue of election. It was contended by the appellants that in a claim for damages for breach under a contract, a person who suffered from the breach could claim either damages for loss of profits (general damages) or the damages in preparation of the performance of the contract or wasted expenditure (special damages). He could not get both but would be entitled to only one. Apparently, the authorities supported the contention of the appellant. In *Ismail v. Haji Taib* [1972] 1 MLJ 259, Suffian FJ (as he was then) delivering the judgment of the Federal Court at p. 260 stated:

> As regards damages, as has already been stated the plaintiff claimed both special damages and general damages. Under special damages he claimed a sum of $1,224, the proceeds at $85 per kuncha of the padi which he estimated he would have harvested less the amount of padi he would have had to give the landlord by way of rent. The trial president allowed this claim though there was no evidence to show that the estimate was reasonable. Even if the estimate was reasonable, the plaintiff should not have been awarded the full sum claimed ($1,224), because there should be deducted from it what he would have had to spend on producing the estimated amount of padi. Here there was no evidence to suggest that the plaintiff had spent any money on the padi field, the evidence being merely that he had prepared the land for planting. The cost of preparing the land was assessed by the learned appeal judge at $500, which was also the figure assessed by the trial president as general damages. We think it reasonable to award the plaintiff by way special damages the sum of $1,224 less $500, the assessed cost of preparing the land. In this connection we would refer to the following passage from the judgment of Lord Denning M.R. in *Anglia Television Ltd v. Reed*:
>
> > ... It seems to me that a plaintiff in such a case as this had an election; he can either claim for his loss of profits; or for his wasted expenditure. But he must elect between them. He cannot claim both. If he has not suffered any loss of profits – or if he cannot prove what his profits would have been – he can claim in the alternative the expenditure which has been thrown away, that is, wasted by reason of the breach. That is shown by *Cullinane v Britist 'Rema' Manufacturing Co Ltd* [1953] 2 All ER 1261, 1264, 1265; [1954] 1 QB 292, at 303, 308.

The appellants' counsel submitted that in view of the principle stated above, the respondent should have made an election before the SAR or the learned judge. He failed to do so, and as such it is for the court to decide which of the damages to be awarded to the respondent. The respondent's counsel contended that the respondent had made the election in the court below. From the record, we could not find any election being made by the respondent. It could not be made before the SAR because it is clear from the notes that the

respondent insisted on both damages be paid to him. It could not be made before the learned judge because nothing was mentioned about the election in his judgment. When the learned judge set aside the award by the SAR in respect of special damages, he did it not because of the election but because there was no sufficient evidence to prove the special damages. As such we agreed with the appellants' counsel that no election was made by the respondent. Even though the respondent did not make any election, it is of no consequence in this appeal. We have found that the respondent failed to prove his claim for loss of profits (general damages) arising from the breach. The respondent is only entitled to the claim for the wasted expenditure expended by him (special damages) due to the breach. Thus no election is necessary in the present appeal.

Conclusion

Our decision in respect of this appeal are as follows:

1. The claim by the respondent in respect of loss of profits (general damages) is hereby dismissed. The award of RM97,200 by the SAR in respect of this and affirmed by the learned judge is set aside.

2. The claim by the respondent in respect of wasted expenditure (special damages) is hereby allowed. The award of RM17,200 made by the SAR in respect of this and was disallowed by the learned judge is hereby reinstated and to be awarded to the respondent.

3. Each party is to bear its own costs in respect of this appeal and the appeal before the learned judge.

4. The deposit is to be refunded to the appellants.